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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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This brief is submitted on behalf of appellant St. Louis Southwestern Railway Company (Cotton Belt) in opposition to the motions to affirm.*

* Motions of the United States and Interstate Commerce Commission, Missouri Pacific Railroad Company, Louisville and Nashville Railroad Company, Chicago & Eastern Illinois Railroad Company, and Leon Leighton, *Pro Se*. References to these motions will be Government or Gov't., MoPac, L&N, C&EI, and Leighton, respectively.

Contrary to the suggestion of the MoPac that appellants are concerned with "collateral issues" (MoPac, p. 9), the series of errors committed by the Commission, if not corrected by this Court, will shape both the administration of the Interstate Commerce Act and the railroad map for years to come. Reduced to simplest terms, the Commission ratified the MoPac's illegal stock purchases that frustrated merger of the C&EI with any of the several other railroads which had displayed an active interest in the C&EI prior to the illegal purchases. That ratification followed directly from the errors of the Commission—it did not consider the circumstances, shown in the record, concerning MoPac's initial violation and thus did not fully understand what the MoPac had accomplished; did not appreciate the scope of the Commission's powers and duties under the Act; did not analyze either the practical or legal effect of the "irrevocable trust"; and believed that, because the C&EI was *in extremis* in 1961 at the close of the record, its choices were limited to approving control either by the errant MoPac or the competing Illinois Central. The end result of the Commission's action was to provide for the bifurcation of the C&EI, with the MoPac controlling the East St. Louis-Chicago line and the L&N owning or leasing the Evansville-Chicago line.*

Had the Commission reopened the record, it would have found that emergency measures were not necessary to save the C&EI from impending bankruptcy and, therefore, that the Commission's choices were not limited as it thought to

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*The interest of the Cotton Belt in this case became acute when the MoPac sought approval to buy the Alton and Southern Railway, a St. Louis terminal railroad, which, when added to its control of the C&EI's bypass route via Thebes, Illinois, would give the MoPac overwhelming power in controlling traffic moving through and around St. Louis.

the unhappy choice of either approval of the MoPac's illegal control or approval of control by the C&EI's competitor, the Illinois Central.

It also now appears that the L&N is unwilling to take the immediate steps contemplated by the Commission to operate the Evansville-Chicago line and may never operate the line.* But the success of the Commission's solution to C&EI's financial problems depends on the L&N's operation of the Evansville-Chicago line, a "dangling appendage" to the MoPac's control—to use the L&N's phrase (L&N, p. 4). It was the distressed condition of C&EI's Evansville-Chicago line, operating at a $2,700,000 loss in 1960, which was causing its problems. The East St. Louis-Chicago line, which would be controlled by the MoPac, was a profitable operation during that period, earning $2,900,000 in 1960 (J.S. 155a).

Appellees are on the horns of a dilemma. To defeat Monon's appeal, the L&N and Leighton contend that consideration of diversion of traffic away from Monon on account of L&N's operation of the Evansville-Chicago line is premature because the L&N may elect never to own or lease that line or the Commission in a subsequent §5(2) proceed-

---

* The Commission concluded that the C&EI should "permit Dixie Line [L&N] to provide service between Evansville and Chicago, including intermediate points and points on branch lines, under trackage or joint use rights temporarily, pending final determination of Dixie Line's acquisition proceeding". (J.S. 68a) After the Commission's decision was released, the L&N announced "that it has no intention to seek any temporary rights". (L&N, p. 10, Note 1) Leighton states that "There is no assurance at this time that L&N will ever make such [permanent right's] application". (p. 14) The L&N similarly casts doubt that it will ever operate the line. (L&N, p. 14)

ing may not grant L&N authority to own or lease the line. But the argument of the MoPac that overwhelming public interest considerations support the Commission's order depends on the "public interest" findings of the Commission which are based on the assumption that the L&N will in fact renovate and provide single-line service over the Evansville-Chicago line.

In order to prevent erosion of the prohibitions in the Act against unlawful control prior to Commission approval, it is essential that the Commission be advised of the extent of its powers and duties. Given a proper appreciation of its powers and duties under the Act in the light of current facts, it may be well that, on the remand, the Commission would conclude that it should restore the parties to their positions prior to the MoPac's illegal purchases to give all railroads an opportunity, within the law, to work out the ultimate destiny of the C&EI by negotiation.*

I.

ABSENCE OF FINDINGS ON CIRCUMSTANCES SURROUNDING THE INITIAL VIOLATION

The appellees do not come to grips with the issue raised by the appellants that the Commission failed to make findings as required under §8(b) of the Administrative Procedure Act which, if made, would have compelled the conclusion that the MoPac's initial illegal act in acquiring the C&EI stock was flagrant. Although suggesting that

* The President of the C&EI testified that the C&EI management feels that a "merger of the C&EI properties with a larger system or systems is desirable. Such a merger is not necessarily required with the railroad applicants in these proceedings. There are other railroads which have an interest in the C&EI, some of which are represented in these proceedings." [Statement B E, p. 2].

the Commission based its conclusion on the "nature, character and extent of and the circumstances surrounding the violation", the MoPac supports that suggestion by listing findings which deal only with its passivity *after* the illegal acquisition (MoPac, pp. 13-14). Those findings are not relevant to an evaluation of the initial violation, since the MoPac's purposes were well served by remaining passive after it had frustrated merger negotiations between C&EI and other railroads by its illegal purchases.* There are no findings in the report dealing with this critical issue.

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* The President of the C&EI testified that the L&N shifted its interest from merger to control after the MoPac purchased the Hammack securities [Com. Tr. 2603]. He also testified that the purchase of the Hammack stock impaired his ability to negotiate merger with the L&N or any other railroad [Com. Tr. 2627].

Contrary to statements in MoPac's motion, the MoPac purchases did have a bearing on the shift in the interest of the L&N from merger to control. On cross-examination, the President of the L&N testified:

> Q (By Mr. Jessup) I will ask the question: Was it [MoPac's purchase of Hammack securities] a factor considered in influencing you to file an application for control?
>
> A Well, your question is different than Mr. McDowell's question.
>
> Q That is the reason I want to explore it with you.
>
> A Yes, I would say it was a factor. It had some bearing on it. [Com. Tr. 3010].

Furthermore, contrary to the MoPac's assertion (p. 15), the record shows that prior to its illegal control other railroads were interested in merger with the C&EI. The President of the C&EI testified as follows:

> . . . from time to time I had conversations with Mr. Heinemann of the North Western, in 1960 and again in 1961, I have had conversations with the New York Central, indicating interest in the C&EI, and I had some indications that possibly the Frisco would be interested in the C&EI.
>
> Exam. Blond: Do you mean by that "interest", a stock interest, proprietary, or securities interest.
>
> The Witness: No, discussing the merger. [Com. Tr. 4380].

The Government's motion impliedly concedes that MoPac's initial violation was "flagrant". The Government argues that "any attempt at revocation [of the trust] while the control application was pending would be a flagrant violation of Section 5(4)". (Gov't., p. 10) Revocation of the trust would place the MoPac in precisely the same position as it was in during the eight-month period prior to the trust. If revocation of the trust would be a "flagrant" violation, the initial purchase and holding of the securities for eight months in the MoPac's name are also "flagrant" violations.*

The case should be remanded to the Commission to make appropriate findings, as compelled by the evidence. Having made such findings, the Commission would then be in a position to determine whether it should summarily dismiss the application, or should weigh the public interest in respect for the law with other public interest considerations, in the light of the improved financial position of the C&EI.

II.

ERRONEOUS CONCLUSION THAT THE VOTING TRUST INSULATED THE MOPAC FROM ILLEGAL CONTROL.

This issue squarely presents to the Court, for the first time, the question of the efficacy of a voting trust to "insulate" a party from illegal control under §5(4), and thus to avoid the consequences of such illegal acts.

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* The same implied concession is found in MoPac's statement that if the trust were revoked the Commission "would undoubtedly immediately . . . order it [MoPac] to divest itself of its C&EI stock." (p. 18).

In attempting to support the District Court's conclusion that the trust was irrevocable "as a practical matter", the appellees ignore the *Chenery* issue. The Commission made no such finding, having looked only to the provisions of the trust. Consistent with *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), the District Court's judgment must be reversed.

The trust device cannot be supported either "in practical terms" or "in legal terms". Even if one were to assume that the MoPac is unlikely to revoke, it does not follow that the trust effectively terminated control. In "practical terms" the conveyance to the trustee changed nothing. So long as the MoPac's trustee held the veto power, no railroad would even consider merger discussions with the C&EI and, in fact, no railroad conducted such discussions. In legal terms, there is no avoiding the well-established rule of law, in this instance codified by New York statute, that a settlor-sole beneficiary may revoke a trust at will.*

Heretofore the Commission has disapproved the trust device in some cases (*McLean Trucking Co.—Investigation of Control*, 70 M.C.C. 601, 607 (Com. 1957)), but more

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* The only argument in support of the majority's conclusion that the trust may be irrevocable which was not dealt with in the Jurisdictional Statements is an argument advanced by the MoPac for the first time that under New York law the trust could not be revoked without approval of the trustee (MoPac, p. 17, Note). The cases cited by the MoPac do not so hold, and *Stover* v. *Garber*, 266 N.Y.S. 2nd 623, 25 App. Div. 2nd 488 (1966) holds directly to the contrary.

recently has been inclined to approve the trust device, as suggested by the Government (Gov't., p. 10). This issue is too important to remain in its present posture of approval by the Commission with the blessing of a divided three-judge Court. Indeed, affirmance by this Court will be taken as a green light to the railroad industry to use the trust device for avoiding the consequences of illegal acts under §5(4).

III.

POWER OF THE COMMISSION SUMMARILY TO DENY A CONTROL APPLICATION UPON FINDING OF VIOLATION OF THE ACT.

The Government argues that the Commission has the power to balance the severity of a violation against other public interest considerations (Gov't., pp. 8-9). That is not the issue before this Court. The error of the Commission was its conclusion of law that it did not have the power "to summarily deny Missouri Pacific's application" upon a finding that the MoPac had violated §5(4) of the Interstate Commerce Act, no matter how serious the violation might be.

The MoPac and Leighton argue that the Commission may not summarily deny an application for control upon finding a §5(4) violation, relying on *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 and on a subsequent lower court decision affirmed by this court, *Alamo Express, Inc.* v. *United States,* 239 F. Supp. 694 (W.D. Tex. 1965) aff'd 382 U.S. 19. (MoPac, pp. 11-12; Leighton, pp. 6-7).*

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* Leighton also attempts to rewrite the Commission's report by suggesting that the Commission did not mean what is said. (pp. 6-7).

That is not the holding of *Gilbertville,* the Court having expressly stated that "an automatic rule is not necessarily arbitrary". (p. 128) If *Alamo Express* is taken to mean that an automatic rule is necessarily arbitrary, then it is indeed important that the scope of the Commission's power be clarified.

Given a proper appreciation of its powers and appropriate findings on the circumstances surrounding the initial violation, the Commission, on remand, may conclude to invoke an automatic rule. But it first must be told by this Court that it has such power under the statute.

IV.

FAILURE TO REOPEN TO RECEIVE FACTS CONCERNING MOPAC'S PURCHASES OF ADDITIONAL RIGHTS IN THE C&EI.

The appellees attempt to support the Commission's refusal to reopen the record to consider the legality of MoPac's purchases of additional stock rights on the ground that the rights were held in the trust, ignoring the conclusion of the District Court that the rights were held outside the trust. A majority of the Court excused these additional violations of the law on the ground that the Commission considered the facts surrounding the additional purchases and that there "is warrant in the law and facts for the result reached". (J.S. 21a) The Court erred, however, in so holding because the Commission re-

fused to reopen the record to consider such facts.* This was a substantial error on the part of the District Court and the case must be remanded to the Commission for its consideration.

V.

FAILURE TO REOPEN TO RECEIVE FACTS UNDERMINING PREDICATE OF COMMISSION'S DECISION.

The L&N concedes that the railroad economic outlook is sharply different today from the situation in 1961 when the record was closed. In attempting to answer appellant Monon's charge that the Commission ignored the Monon's estimates of traffic diversion, the L&N says:

> With respect to the Monon's estimate, it does not take into account such factor as that the study period was 1961, when the railroads' share of intercity traffic and the level of economic activity were lower than in recent years. [L&N, p. 7]

If the change in the railroad economic picture is so different as to substantially affect the diversion estimates of the Monon, it must be sufficiently different to cause the Commission to reconsider whether the C&EI is still *in extremis*. We need not engage in speculation, because the facts tendered in the petitions to reopen show that the C&EI has

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*All the facts surrounding the additional purchases were not in the record, as stated by the MoPac in its motion (p. 19). The General Counsel of the Commission candidly so conceded in his argument before the Court:

> Judge Decker: Do we have all of the details as to that acquisition in this record?
>
> Mr. Ginnane: All of the details, no, sir.
>
> [Court Tr. p. 85]

steadily improved over the five-year period since the close of the record.*

Only the Government attempts to distinguish the facts in the instant case from the facts in *Atchison, T. & S.F.R. Co.* v. *United States,* 284 U.S. 248 (1932), asserting that "such a recent change in the company's financial condition is hardly the overwhelming change in circumstances which required rehearing in *Atchison*" (pp. 15-16). The changes considered by this Court in *Atchison* were from the close of the record in September, 1928 to 1931. Here the changes in the condition of the C&EI have been building steadily from 1961 to date, or almost five years. The changes in the economic indicators detailed by this Court

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* Leighton presents financial data said to be from the C&EI's Annual Report to the Commission (Leighton, p. 11). The data actually reported by the C&EI to the Commission are not as stated by Leighton. The 1965 Balance Sheet reported to the Commission shows current assets of $11,735,791 and current liabilities of $9,104,852, for a comfortable working capital of $2,630,939. Debt due within one year is reported as $2,475,447.

Leighton's concern about the amount of debt due in one year is unwarranted. For the first three quarters of 1966, the C&EI reported net income after fixed charges of $2,747,793 and depreciation of $1,974,776, giving more than ample coverage to retire debt payable in 1966. In contrast, the 1961 data relied upon by the Commission showed a *negative* working capital of $2,047,000 and debt due within one year of $2,884,000 (J.S. 106a-108a).

in *Atchison* are less dramatic than here.* If the Commission acted within its discretion in denying the petitions here, then it is impossible to escape the conclusion that *Atchison* is no longer the law. We submit that the Court should give plenary consideration to this question before it decides whether to overrule *Atchison*, giving administrative agencies *carte blanche* authority to decline to reopen records when there have been overwhelming changes in circumstances which are critical to resolution of the issues of a case.**

On a reopened record, the Commission may conclude that the C&EI is strong enough to remain independent, at least until its destiny can be determined by orderly, legal procedures. In *Western Pacific Control—Southern Pacific*, Finance Docket No. 21314, *et al.* (January, 1965), rendered

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* For example, in *Atchison* revenues were down 14.92 percent and here C&EI revenues are up 24 percent; in *Atchison* carloadings were down 14.06 percent from 1930 and 20.98 percent from 1929 and here C&EI revenue car-miles are up 19 percent; in *Atchison* the market price of common and preferred stock had so declined as to make it impossible to secure additional capital through sale of stock and here the price of C&EI stocks has risen to the point that the C&EI could make the first issue of equity stock of any railroad since the Great Depression. (Factors given in 284 U.S. at 256-7 and Cotton Belt's Petition for Reconsideration, pp. 6-8).

**Appellees contend that the Commission's refusal to reopen is within the standards defined by *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944) and *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946) (Gov't., p. 16; Leighton, pp. 12-13). In those two cases there was no showing that the new facts would have led to a different result than that already reached by the Commission. Here the public interest conclusions depend on the Commission's finding that immediate action was necessary to prevent impending C&EI bankruptcy (J.S. 91a).

only a month before the decision here, the Commission disapproved control by either Southern Pacific or the Atchison, Topeka and Santa Fe Railway of the Western Pacific Railroad, which is a short-haul bridge carrier like the C&EI. The only significant difference in the two railroads was that the Western Pacific was in fairly sound financial shape, whereas the C&EI appeared to be in serious financial difficulty, based on the stale financial data upon which the Commission relied.

CONCLUSION.

The questions presented by this appeal are important and substantial and the judgment of the lower court is erroneous. This Court should note probable jurisdiction.

Respectfully submitted,

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